that the story of these appellants "had cast no doubt on the prosecution story" and that he was convinced beyond reasonable doubt that there was a conspiracy between these two to cheat the Federation Government.

In *Balasingham* v. *Public Prosecutor* [1] Ismail Khan J. said:

"The trial court is under a statutory obligation under section 308 of the Criminal Procedure Code to transmit to the appellate court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law, not merely the conclusion arrived at. The advantage of a 'speaking' judgment needs no emphasis."

Perhaps I should repeat what I said in *Augustine* v. *Public Prosecutor*: [2]

"I do not consider the simple *ipse dixit* of the magistrate sufficient to constitute proper grounds of judgment. It is not enough to use the words of Shelley, 'I cannot argue, I can only feel,' as the foundation of a judgment (see Holroyd Pearce L.J. in *Oliver* v. *Ashman* [3]). Except in the most straightforward type of cases, where the facts clearly establish all the necessary ingredients of an offence, it is the duty of the magistrate to state at least what were his findings of fact."

Of neither appellant was there any finding by the president that they knew or must have known, that the work was never carried out. It is not enough for him to state, in general terms, that he thought they were guilty.

In all the circumstances, I would allow this appeal, quash and conviction and order a retrial.

Appeal allowed.
Retrial ordered.

Solicitors: *Skrine & Co.* and *Athi Nahappan & Co.*

LEW FA v. SENG CHONG METAL WORKS LTD.

[O.C.J. (Abdul Aziz J.) January 10, 1966]

[K.L. — Civil Suit No. 276 of 1965]

Damages — Left hand — Amputation up to wrist leaving stump of thumb.

Machinery Ordinance, 1953 — Machinery (Driven Machinery) Regulations, 1959, reg . 31 — Breach of statutory duty — Contributory negligence.

The plaintiff brought an action for damages against the owner of a factory for breach of statutory duty. The plaintiff was engaged to operate a machine called a "press brake" for the making of window frames. It was alleged that the machine was a power press and that it was the failure to provide a guard as required under the regulations which caused the accident in this case, which resulted in the loss of the plaintiff's arm.

Held: (1) the machine was a power press and the failure to provide the guard was the dominant and effective cause of the accident;

(2) in the circumstances of the case it could not be said that the plaintiff had failed to take reasonable care of himself or that the carelessness or inadvertence on his part amounted to contributory negligence;

(3) having regard to the trend of awards in cases where a hand had been amputated and having regard also to the age of the plaintiff, general damages $43,000 (which includes $15,000 for loss of future earnings) were awarded.

[Editorial Note: As we go to press we received the judgment of the Federal Court (Thomson L.P., Ong Hock Thye F.J. and Gill J.) dismissing the defendants' appeal against the learned judge's finding of liability. There was no appeal on the question of quantum of damages. The Federal Court however observed that the award was an extremely generous one. The judgment of the Federal Court will be reported in due course.]

Cases referred to:—

(1) *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152; [1939] 3 All E.R. 723.

(2) *Nance* v. *British Columbia Electric Co. Ltd.* [1951] A.C. 611.

CIVIL SUIT.

Kam Woon Wah for the plaintiff.

H. E. Cashin for the defendants.

Cur. Adv. Vult.

Abdul Aziz J.: This action was brought by Lew Fa (an infant suing by his father and next friend Liew Choy) against the owner of a factory for damages for breach of statutory duty whereby the plaintiff's left hand was seriously injured by a machine which he was using at the time. There was also an additional allegation of breach of common law duty in the pleadings but this was subsequently abandoned by the plaintiff.

The facts are not in real dispute. On the date of the accident (18th December 1963) the plaintiff, who was approximately 17 years old and had been in the employment of the defendant company for three months, was engaged to operate a machine for the making of window frames. The machine was technically known as a bending and shearing machine which the manufacturers called 'press brake' because of the modifications and improvements made thereto particularly in the braking system. A photograph of the machine was shown to the court and the court was told that it could easily be operated by one operator, using one foot to press the foot pedal (starter) and two hands to insert a zinc plate or metal bar between the presses (dies). It was not an automatic machine in the sense that once the foot pedal was pressed the upper die would move up and down incessantly until another distinct operation stopped it. If the pedal was pressed down there would only be one up and down stroke and if released the die would stop at the position where the foot was lifted. On the date in question the plaintiff stated that he placed a zinc sheet into the machine between the upper and lower die. The zinc sheet was not properly inserted and as the machine was vibrating the sheet became displaced and as he was trying to correct it the upper die pressed downwards and crushed his left hand. Although it was not formally admitted it was not disputed that there was no guard to prevent the operator's hand from

reaching the moving parts of the machine and that the plaintiff's left hand was crushed by the moving parts. The plaintiff said he was only instructed once on how to operate the machine. Mr. Wong Kim Hau, the managing director of the defendant company, stated he supervised the plaintiff's work and at the time of the accident he was standing behind the plaintiff and as soon as he heard a shout he turned and saw the plaintiff's hand in the machine. He released the die to free the hand. The plaintiff was removed to hospital with fractures of the second, third, fourth and fifth left metacarpal bones of the hand. The injuries developed into gangrene and consequently on the 23rd December 1963 the left hand was amputated up to the wrist leaving only the stump of the left thumb. The left arm itself has lost most of its functions and it is not unfair to both parties to say that the injuries suffered by the plaintiff were severe and that the loss of the left hand would be a great handicap to him and a great loss to his future earning capacity.

The plaintiff attributed the accident to the failure on the part of the defendant firm to comply with the Machinery (Driven Machinery) Regulations 1959 which states —

"31. (i) Every hand fed power press shall be provided with one of the following means of protection:

(a) A static fixed guard so arranged to guard the front and both sides of the ram as to prevent the operator's fingers from reaching the danger zone. The distance of the front (or feeding side) of the fixed guard from the ram and length and depth of feed opening shall comply, wherever practicable, with the Third Schedule.

(b) An interlocked guard so arranged that the ram cannot make a pressing stroke unless the guard is in its protective position and so guards the front and both sides of the ram that the operator's fingers cannot reach the danger zone when the guard is in its protective position.

(c) A two hand operating device so arranged as prevent the placing of hands in the danger zone before completion of the operating stroke of the ram. Such operating device shall be designed to require the simultaneous action of both hands of the operator to operate the press and shall be so arranged and installed that it cannot be operated by one hand. On pedal operated presses a device may be provided which requires both hands of the operator to release it before the foot pedal can be moved.

(d) An automatic sweep guard so arranged to sweep the operator's hand out of the danger zone as the ram decends, and fixed guards at the sides of the press, so arranged that no 'nipping' hazard can exist between the sweep guard and any fixed structure: Provided that no protective device need be fitted to any hand fed power press where the stroke of the ram is such that the maximum possible clearance between the ram and the die or stripper is three-eighths of an inch or less.

(ii) .....

(iii) Every foot pedal on every hand fed press shall be so shielded that it cannot be accidentally struck."

The plaintiff alleged that the duty imposed on the owner by the Regulations was absolute and the damage which flowed from the breach of statutory duty must fall on the defendants.

Before I deal with the question of liability I think it would be convenient to deal with one minor question raised by the defence. Is a press brake a power press and therefore subject to the Regulations? For an answer I must necessarily rely on the evidence of experts. A report of the Joint Standing Committee on Safety (United Kingdom) to which I have been referred reads —

".....the press brake is essentially a power press of a special type primarily designed for particular purposes, of the nature of straight line bending operations. Its distinguishing features are

(a) a long narrow tool slide and bed

(b) a clutch or fluid control which in normal operating conditions, can be engaged and disengaged at will by the operator. In the free condition the clutch or fluid control is out of engagement, and the brake is applied."

I have also heard the evidence of Mr. Dean, the chief inspector of machinery, and I accept his opinion that the press brake comes under the generic term of power press and is governed by the Regulations.

The defendants denied liability, denied any breach of statutory duty and alternatively claimed that if there was any negligence on their part the accident was contributed by the negligence of the plaintiff.

The defendants contended that it would require two hands to insert the metal into the machine and if the accident had occurred in the manner described by the plaintiff then it would have been inevitable that both hands would have been injured in the accident. They also claimed that after the accident no metal sheet or any other material was found in the machine and the absence of blood on any metal sheet in or near the machine indicated that the machine was not operated for the purpose for which it was installed.

In *limine*, the burden of proof in actions by an employee against an employer for breach of statutory duty is the same as that imposed on all other plaintiffs. The basic principle as stated by Lord Macmillan in *Caswell* v. *Powell Duffryn Associated Collieries, Limited*,[1] is that —

"The mere fact that at the time of the accident..... his employers can be shown to have been in breach of statutory duty is clearly not enough in itself to impose liability on the employers. It must be shown that the accident was casually associated with the breach of statutory duty."

The circumstances of the accident are unknown so that it is a matter of inference whether the breach of statutory duty has been the cause of the accident. One point seems clear that the non-provision of a guard to the foot pedal could in no way contribute to the accident. Was the non-provision of the hand guard, therefore, the

cause of or contributory to the accident? There is ample authority to support the hypothesis, that if there is a definite breach of a safety provision imposed on the occupier of a factory and a workman is injured in a way which results from the breach, the onus of proof is on the employer to show that the breach is not the cause. On the facts there was a breach of safety regulations and the accident was associated with the breach. The safety regulations, if complied with, would have prevented the accident or at least minimised the risk of an accident as in this case. The failure to provide the guard seemed to me to be the dominant and effective cause. It is for the defendants, therefore, to satisfy me that the breach was not the cause.

Defendants' case is that at the time of the accident there was a certificate of fitness issued by the Machinery Department in respect of that particular press brake and that when a fresh certificate was issued to the defendants following the suspension of the certificate after the accident the Machinery Department had only considered it necessary to require the placing of guards over the foot pedal but not a 'hand guard' and that the machine itself had a built-in safety device and the provision of a guard to protect the hand that feeds the machine would not only be useless but would also impede the proper working of the machine.

I think there is no substance in the defendants' argument. I think it counts for nought what the factory inspector might have decided nor that the machine was equipped with safety devices. The regulation is clear and the duty is absolute. On the facts I can find nothing to support the contention of the defendants that the plaintiff, "out of bravado or some other foolish cause", inserted his hand between the moving dies. It seemed highly unlikely that the plaintiff who was an inexperienced worker would attempt any youthful pranks of the nature alleged by the defendants, when the managing director was behind him literally breathing down his neck.

The next question to consider is to what extent, if any, has the plaintiff contributed to the accident. Counsel for the defendants has urged me to say that there was contributory negligence on the part of the plaintiff in failing to take proper precautions for his own safety. To start the machine would require a deliberate act of pressing the foot pedal and that it was extreme folly on the part of the plaintiff to start the machine by depressing the foot pedal and keeping it depressed when his left hand was directly under the die and it was also folly on the part of the plaintiff to have started the machine without ensuring that the plate was properly inserted or placed. All this I think could be summed up as carelessness or inadvertence on the part of the plaintiff but is that sufficient to discharge the onus of proof?

On the question of contributory negligence *Halsbury* Vol. 36 at page 460 quoted a number of cases for the hypothesis —

> "Contributory negligence is a good *partial* defence to an action founded on breach of statutory duty, even if the duty is absolute. This defence is subject to the statutory provisions relating to the apportionment of liability where both parties are at fault so that in a case in which both parties are to blame contributory negligence will result in the amount of damages being apportioned between them."

The English statutory provision (The Law Reform (Contributory Negligence) Act 1945) is in *pari materia* with our section 12(1), Civil Law Ordinance 1956 which reads —

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:"

The word "fault" has been defined by sub-section (6) —

> "In this section 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Ordinance, give rise to the defence of contributory negligence."

In considering the question of contributory negligence I must not lose sight of that illuminating passage in the judgment of Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*:

> "The argument is that safety obligations are placed upon employers for the purpose of protecting not only workmen who are careful but also those who are careless, and that the object of the Legislature is defeated if the right to sue for injuries caused by the breach of the safety regulations is denied to the careless workman for whose benefit, amongst others, the legislation was specially enacted. I venture to think that this attractive theory does not give sufficient weight to the true cause of action in such cases. The statute does not, for instance, make the employer an insurer. The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach. If his damage is due entirely to his own wilful act no cause of action arises; as, for instance, if out of bravado he puts his hand into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendants' omission but by the plaintiff's own act. But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be no defence."

His Lordship went on to say —

> "I cannot therefore accept the view that the action for injuries by breach of statutory duty differs from an action for injuries caused by any other wrong. I think

that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances.

But having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of factory or mine."

It was also decided in that case that a man ought not to be regarded as negligent in respect of every careless act which he may do when working in a factory.

The question of contributory negligence does not depend upon any breach of duty as between plaintiff and defendant. As the Judicial Committee stated in *Nance* v. *British Columbia Electric Railway Company Ltd.*,(2) (*per* Lord Simon) —

".....all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

Like an eminent English judge, I do not propose to "expound theories of causation, with or without the aid of Latin maxims". I will apply the test in *Nance's* case and simply ask the question: Having regard to the circumstances of the case was the accident partly the fault of the plaintiff? The plaintiff was an inexperienced worker and the working of the machine would require close coordination between his leg and his hands. The job he was performing was routine and could be monotonous in the environs in which he was working. Like an inexperienced motor car driver he was as likely to step on the accelerator when he meant to apply the brakes. Under those circumstances it could not be said that he failed to take reasonable care of himself or that the carelessness or inadvertence on his part amounted to contributory negligence. There must be something more than that.

On the question of damages the findings of Mr. Gawne that, to all intents and purposes, the left hand is completely useless, has not been discredited. The loss of this hand would be a severe loss of amenities and would affect his future earnings. It is true that the defendant has offered to take the plaintiff back in the employment but that, to my mind, would in no way detract from the position that the loss of the hand is a severe loss of future earning capacity. In dealing with the question of general damages, therefore, I took into account the pain and suffering, the embarrassment, loss of amenities and loss of future earnings consequent upon the loss of the left hand. Having regard to the trend of awards in cases where a hand had been amputated and having regard also to the age of the plaintiff, I assess and I do hereby award $43,000 as general damages which includes $15,000 for loss of future earnings. The special damages has been agreed at $450. The defendants shall also pay the cost of the plaintiff as taxed by a proper officer of the court.

Order accordingly.

Solicitors: *Kam Woon Wah & Co.; Murphy & Dunbar.*

NG KAY THONG v. CHEE SHAN SHONG

[O.C.J. (Abdul Aziz J.) January 13, 1966]
[K.L. — Civil Suit No. 758 of 1964]

Negligence — Balance of probabilities — Quantum of damages — Loss of arm.

Damages — Left arm — Amputation of.

The plaintiff sustained injuries in a traffic accident. He alleged that he was knocked down by a car. Evidence was called to show that it was the defendant's car which was involved in the accident. The defendant denied that his car was involved in the accident. The plaintiff who was 42 years old and a bill collector sustained injuries as a result of which his left arm had to be amputated.

Held: (1) on the balance of probabilities it was the defendant's car which was involved in the accident and the accident was caused by the defendant's negligence in driving the said car;

(2) in the circumstances of this case and having regard to the current trend of awards in similar cases, the general damages in this case would be fixed at $22,500.

Cases referred to:—

(1) *Pahang Lin Siong Motor Co. Ltd. & Anor.* v. *Cheong Swee Khai & Anor.* [1962] M.L.J. 29.

(2) *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.* [1964] M.L.J. 463.

(3) *I.R.K. Tandon* v. *Ng Siok Kwee & Anor.* [1964] M.L.J. xlv.

CIVIL SUIT.

H. E. Cashin for the plaintiff.

N. Marjoribanks for the defendant.

Abdul Aziz J.: This is an action for damages for injuries sustained in an alleged traffic accident which occurred on the 31st December 1963 at Jalan Kolam Ayer, Kuala Lumpur, which is a small lane branching off from another small lane passing through a new village.

There are two issues: Firstly, whether there was this traffic accident as alleged by the plaintiff which caused the injuries to the left elbow and arm, and secondly, if there was negligence on the part of the defendant, the quantum of damages.

The plaintiff's case was that on the day in question at about 6.30 to 7 p.m. he was returning